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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Petitioner,

v.

MACK TRUCKS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When, on a defendant's motion for directed verdict, the district court determines that the defendant has "breached the coliective bargaining agreement" and the court of appeals affirms that conclusion but remands the case for further proceedings, does the district court's "Conclusion of Law" regarding contract breach—as affirmed by the court of appeals—become the "law of the case" not subject to relitigation on remand?

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

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PETITION FOR A WRIT OF CERTIORARI

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), the plaintiffs in the district court and the appellants in the court of appeals, hereby petition for a writ of *certiorari* to review the judgment of the United State Court of Appeals for the Third Circuit in *International Union, UAW v. Mack Trucks, Inc.*, Third Circuit No. 90-1192 (October 18, 1990).

OPINIONS BELOW

The second court of appeals' opinion is reported at 917 F.2d 107 and is reproduced at pp. 1a-11a of the appendix to this *certiorari* opinion (hereafter "Pet. App."). The

first court of appeals' opinion is reported at 820 F.2d 91 and is reproduced at Pet. App. 14a-27a.

The first district court order granting defendant's motion for a directed verdict is unreported and is reproduced at Pet. App. 54a-64a. The second district court order is reported at 733 F.Supp. 938 and is reproduced at Pet. App. 28a-53a.

JURISDICTIONAL STATEMENT

The court of appeals' opinion was entered on October 18, 1990 Pet. App. 1a. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves § 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, which provides in pertinent part as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

For many years, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) has represented the hourly employees of Mack Trucks, Inc. UAW and Mack have been parties to a series of collective bargaining agreements governing the terms and conditions of employment of these UAW-represented Mack employees.

The collective bargaining agreement in effect from October 30, 1984 to October 20, 1987 contained a pro-

vision regarding the method by which Mack would meet its obligation to provide certain health care benefits to approximately 10,000 UAW-represented employees, retirees, and their families. After describing the Company's options regarding methods of providing these benefits, that provision states:

> The Company shall not exercise its option to select an alternate delivery system until the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any delivery system other than Blue Cross/Blue Shield. (4a)

When Mack changed carriers from Blue Cross/Blue Shield to Equitable during the term of the 1984-87 agreement, without the agreement of the UAW, the UAW informed Mack that it had violated the contractual prohibition against "exercis[ing] its option to select an alternative delivery system until the parties have reached mutual agreement on the terms and conditions . . . that would be applicable to any delivery system other than Blue Cross/Blue Shield." *Id.* When Mack refused to retract its decision, the UAW commenced this litigation to enforce the labor agreement.

The UAW moved for a permanent injunction, seeking to prevent Mack from switching carriers absent "mutual agreement on the terms and conditions."

At the close of the UAW's case, Mack moved for directed verdict. Mack argued that, because the coverage provided by Equitable was identical to that provided by Blue Cross/Blue Shield, the balance of equities favored Mack. (60a). Mack also argued that there was no contract violation because—by signing the Blue Cross/Blue Shield program agreement—the UAW had "tacitly accepted" any carrier which could match those terms. (59a) Mack also argued that no contract violation occurred because the UAW's agreement to the terms of the Blue Cross program constituted the "mutual agreement"

needed before the Company could exercise its option to select an alternate delivery system. *Id.*

The district court disagreed with Mack's contract violation arguments "for two reasons" and "agree[d] with the UAW that Mack violated the insurance program agreement." (59a) As one of only five "Conclusions of Law," the district court concluded that "Mack breached the collective bargaining agreement by changing its health insurance carrier from Blue Cross/Blue Shield to Equitable without the consent of the UAW." (61a)

On the equities, the District court agreed with Mack and held that the UAW had failed to show that the Union or its members had been harmed by Mack's unilateral change in carriers. The District court therefore refused to issue the injunction and entered judgment in favor of Mack.

On appeal, the Third Circuit left unchanged the District court's decision that Mack had violated the contract. Thus, the Court stated that "[w]e agree with the district court that Mack's decision to change unilaterally the health insurance carrier for its employees violated Mack's collective bargaining agreement with the UAW." (15a) The Court also noted that "Mack appears to concede that it (in the district court's words) 'breached the collective bargaining agreement by changing its health insurance carrier . . . without the consent of the UAW.'" (20a) The Third Circuit therefore found it "beyond dispute that Mack violated its contract." *Id.*

The Third Circuit also reversed the district court's finding regarding harm, holding that "[t]he record proves that Mack deprived the Union of the benefit of its bargain." (21a) The Court, therefore, remanded the case for further proceedings.

Despite the District court's earlier "Conclusion of Law" that "Mack breached the collective bargaining agreement" (61a)—and the Third Circuit's conclusion

that it is "beyond dispute that Mack violated its contract" (20a)—the district court, on remand, allowed Mack to develop an entirely new argument regarding contract compliance. The District court then concluded that the change from Blue Cross/Blue Shield to Equitable was not prohibited by the contract and therefore found that no contract violation occurred. (50a). The Third Circuit affirmed.

REASONS FOR GRANTING THE WRIT

In this case, the district court, following lengthy hearing and argument, granted a directed verdict for defendant Mack Truck. During those proceedings, Mack advanced two arguments that its conduct had not violated the labor agreement between Mack and the UAW. The district court, however, disagreed with those arguments and, as one of only five "Conclusions of Law" reached in connection with its decision, ruled that Mack "breached the collective bargaining agreement." (61a)

Despite this finding of contract breach, the district court granted directed verdict in favor of Mack on the grounds that the UAW had failed to show harm to itself or its members as a result of Mack's breach. The UAW appealed that ruling.[1]

On the first appeal, Mack "appear[ed] to concede that it . . . breached" the agreement (20a) and the Court of

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[1] Mack did not cross appeal any aspect of the district court's ruling. Since Mack had obtained a favorable disposition of its motion for directed verdict, however, Mack would most likely have been unable to cross appeal. *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939), *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1979). Even if Mack would not be allowed to cross-appeal, however, Mack certainly had the opportunity and obligation to raise any arguments it wished presented on the contract breach element of the case before the Court of Appeals, as it had raised those issues in the district court. Any inability to file a cross appeal does not justify Mack's "appear[ing] to concede" that it breached to contract during the first appeal.

Appeals "therefore [found] it beyond dispute that Mack indeed violated its contract." *Id.* The Court of Appeals also specifically noted that it "agree[d] with the district court that Mack's decision . . . violated Mack's collective bargaining agreement with the UAW." (15a)

Following the Court of Appeals' remand, Mack abandoned the two arguments it had made previously regarding contract breach and began a new attack on the UAW's argument that the contract had been breached. Rather than respond to this new argument, the UAW relied on the previous unequivocal findings of both the district court and the Court of Appeals that the contract had been breached. Both the district court and the Court of Appeals in the second appeal, however, adopted Mack's new argument and concluded that—despite the earlier holdings regarding contract breach—Mack's conduct did not breach its labor agreement.

1. The basic principles of the "law of the case" doctrine are well established. "[W]hen a court decides upon a rule of law, that decision should continue to govern the same isues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). It is also, of course, well established that the law of the case doctrine does not operate as a limit to the jurisdiction of the courts but instead functions as a rule of practice that courts will "refuse to reopen what has been decided." *Messinger v. Anderson*, 225 U.S. 436, 444 (1912).

While the policy bases for the law of the case doctrine have been described differently, it is clear that adherence to this rule protects "adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of incorrect decisions." *Montana v. U.S.*, 440 U.S. 147, 153-154 (1979) and that it "maintain[s] consistency and avoid[s] reconsideration of mat-

ters once decided during the course of a single continuing lawsuit." 18 Wright, Miller & Cooper, *Federal Practice and Procedure* (1981) § 4478.

At least one court of appeals has also noted that the law of the case doctrine protects the reliance interests of litigants by assuring the party who prevails on a particular issue that he or she will not be forced to litigate that issue again, even if his or her opponent conjures up a new argument on that issue. *Little Earth of the United Tribes v. HUD*, 807 F.2d 1433, 1441 (8th Cir. 1986).

This doctrine has been extended by many circuits to cover not only issues actually raised during an initial appeal, but also to issues that could have been but were not raised during the first appeal. In *Laffey v. Northwest Airlines*, 740 F.2d 1071 (D.C. Cir. 1984), for example, the circuit court applied the law of the case doctrine to bar re-examination of an issue which a party "had the opportunity to raise" in the first appeal but did not. 740 F.2d at 1093. See also, *Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987), *Northwestern Indiana Telephone v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ["[W]here an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand."] *Munoz v. County of Imperia*, 667 F.2d 811, 817 (9th Cir. 1982) ["We need not and do not consider a new contention that could have been but was not raised on the prior appeal . . . It is already the law of the case."]

Perhaps the best formulation of the reasons for application of the law of the case doctrine to issues which could have been raised but were not was by Judge Friendly writing for the Second Circuit in *Fogel v. Chestnutt*, 668 F.2d 100 (2nd Cir. 1981), *cert. denied*, 459 U.S. 828 (1982). In deciding that a party would not be allowed to argue an issue that could have been raised during the first appeal—but was not—Judge Friendly observed that "[i]t would be absurd that a party who has

chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." 668 F.2d at 109.[2]

2. In the present case, Mack argued before the district court prior to its first decision that its conduct did not breach the contract. The district court disagreed and concluded that Mack did in fact breach the agreement. Mack then could have, but did not, press those arguments before the Third Circuit during the first appeal. The Third Circuit, therefore, found that it was "beyond dispute" that the contract had been breached. On remand, however, Mack presented an entirely new argument regarding contract breach.[3]

Under the rule announced by the Second Circuit, and followed by the D.C. Circuit and the Eighth and Ninth Circuits as described above, Mack would not have been allowed to present a new argument regarding an issue that had already been resolved during the first appeal. The Third Circuit, in conflict with those decisions, however, allowed Mack to present this new argument. In direct conflict with Judge Friendly's admonition, therefore, Mack clearly "stood better as regards the law of the case" by not pressing its contract breach arguments dur-

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[2] The Second Circuit has also developed a limited number of reasons to justify departure from the law of the case doctrine in particular circumstances including dramatic changes in governing law, newly discovered evidence, and the correction of clear error. *Doe v. New York City Dept. of Social Services*, 709 F.2d 782 (2d Cir. 1983). Neither Mack nor the Third Circuit here justify the result based on these factors.

[3] Thus, Mack argued for the first time on remand that the phrase "alternate delivery system other than Blue Cross/Blue Shield" is ambiguous. During the first hearing, Mack did not advance this argument but instead conceded that this language unambiguously prohibits a change in carrier absent mutual agreement. Having previously ignored any argument regarding ambiguity, Mack on remand—for the first time—argued that "alternate delivery system" did not mean the identity of the carrier despite the clear language: "alternate delivery system other than Blue Cross/Blue Shield."

ing the first appeal but instead waiting until the case was remanded to advance those arguments. If allowed to stand, this result will lead to piecemeal resolution of litigation and will encourage litigants to revisit issues already decided.

3. Both the district court and Third Circuit held that Mack should be allowed to press its new argument regarding contract breach for the first time following the remand because the first decision of the district court was rendered on Mack's motion for directed verdict. Thus, the Third Circuit held in the second appeal that Mack should not be barred from raising that argument because Mack had not had the opportunity to present evidence during the first trial prior to its motion for directed verdict.

Our research has revealed no cases holding that the "law of the case" doctrine operates differently depending upon whether the first order of the district court is in response to a motion for directed verdict.

To be sure, both Mack and the Third Circuit may be correct that the district court *erred* in concluding—prior to an opportunity for Mack to fully present its case—that Mack had breached the contract. The proper remedy for such error is for Mack to raise its arguments during the *first* appeal. This error does not justify a departure from the well-established principles of the law of the case doctrine.

If Mack believed that the district court's conclusion regarding contract breach was incorrect, or that Mack's conduct could be defended on the ground that no contract breach occurred, it surely had the obligation and the opportunity to raise those arguments during the first appeal. And, since Mack refrained from doing so, the Third Circuit approved the district court's conclusion and that conclusion became the law of the case.[4]

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[4] It is important to emphasize the nature of these decisions regarding contract breach in the first decision of the district court and

By allowing Mack to revisit an issue already determined by the court of appeals in the first appeal, the Third Circuit has departed from the otherwise accepted rule that the law of the case doctrine encompasses those issues decided during a first appeal. The decision below is therefore in conflict with those of the Second, Eighth, Ninth and District of Columbia circuits discussed above.

CONCLUSION

For the foregoing reasons, this court should grant certiorari to review the decision of the Third Circuit.

Respectfully submitted,

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Dated: January 14, 1991

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the Third Circuit. Neither of those courts stated that the UAW had made out a "prima facie" case of contract breach, that "assuming arguendo" that Mack breached the contract, or that the question need not be reached. Instead, the district court—as one of only five "Conclusions of Law"—held that Mack violated the agreement. And the Court of Appeals specifically "agree[d]" with the district court's conclusion in this regard and held that contract breach was "beyond dispute." Given the clarity of these holdings, the UAW reasonably relied that these holdings of contract breach had become the law of the case.

APPENDIX

APPENDIX

Filed October 18, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1192

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

v.

MACK TRUCKS, INC.,

INTERNATIONAL UNION, UAW,
Appellant

On appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 85-07417)

Argued August 27, 1990

Before: HUTCHINSON and NYGAARD,
Circuit Judges and RE, *Judge* *

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

(Opinion filed: October 18, 1990)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

In its second appearance before this Court as an appellant in this case, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (UAW) appeals the district court's order concluding that Mack did not breach the parties' 1984 Collective Bargaining Agreement and denying the UAW's request for injunctive relief. The UAW challenges this order on three grounds: (1) that the district court was bound by the prior opinion in this case, *International Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91 (3d Cir. 1987), which the UAW asserts held that the contract was

breached; (2) that the contract language is unambiguous and required Mack to seek the UAW's approval of the terms and conditions of health insurance coverage before changing health insurance carriers; and (3) even if the contract language is ambiguous, the court's finding is clearly erroneous.[1]

We have jurisdiction over the district court's final judgment pursuant to 28 U.S.C.A. § 1291 (West Supp. 1990). The district court had subject matter jurisdiction over this suit pursuant to 28 U.S.C.A. § 1331 (West Supp. 1990) since this case arose under § 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C.A. § 185 (West 1978). We will affirm.

I.

This case involves a dispute over whether Mack could unilaterally change its health insurance carrier from Blue Cross/Blue Shield to Equitable without UAW approval, when the terms and conditions of the substituted coverage remained the same. Before 1984, the Collective Bargaining Agreement between Mack and UAW required that Mack use Blue Cross as its employees' health insurance carrier. By 1984, however, the Blue Cross plan costs had increased significantly, so during the 1984 negotiations, Mack proposed that it be able to unilaterally change carriers. The UAW countered that it would agree only after both parties accepted the terms and conditions of the proposed health insurance coverage.

The UAW's main concern was what the coverage would be, not who provided it. The parties, however, could not agree on the terms and conditions of coverage before the

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[1] The district court also rejected the UAW's request for injunctive relief because the balance of equities favored Mack. The UAW contends that the court considered factors it should not have. Because we will affirm the district court's conclusion that Mack did not breach the contract, we do not reach this issue.

contract expired so they decided on a temporary solution. The UAW made the following proposal:

> The terms and conditions of coverage, including those amendments made in these negotiations, are continued on the assumption that the current provider arrangement with Blue Cross/Blue Shield will continue for the term of the labor agreement. The company shall not exercise its option to select an alternate provider until the parties have reached a mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any provider other than Blue Cross/Blue Shield.

Mack in turn suggested the following changes: strike "provider" from the first sentence; and change "alternate provider" or "alternate carrier" to "alternate delivery system." The UAW agreed and the provision was changed to read:

> The terms and conditions of coverage, including those amendments made in these negotiations, are continued on the assumption that the current arrangement with Blue Cross/Blue Shield will continue for the term of the labor agreement. The company shall not exercise its option to select an alternate delivery system until the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any delivery system other than Blue Cross/Blue Shield.

Later, Mack informed the UAW that it was changing health insurance carriers from Blue Cross to Equitable. Equitable would provide the same benefits in the same manner and under the same terms and conditions as Blue Cross. In January 1986, Mack unilaterally switched carriers.

Meanwhile, the UAW filed this action seeking to preliminarily and permanently enjoin Mack from changing carriers. The UAW later withdrew its motion for pre-

liminary injunction and proceeded to a non-jury trial for a permanent injunction. After the UAW presented its evidence, Mack moved for a directed verdict under Fed. R. Civ. P. 50, asserting that the UAW failed to prove both a breach of contract and irreparable harm.[2] The district court granted the directed verdict, finding that although the UAW had shown that Mack violated the contract, the UAW was not entitled to equitable relief because it failed to show irreparable harm.

The UAW appealed, arguing that it had presented sufficient evidence of harm to overcome Mack's motion for a directed verdict. We reversed, concluding that Mack's breach did harm the UAW and remanded for further proceedings consistent with the opinion. We reasoned that by unilaterally changing health insurance carriers Mack deprived the UAW of a bargaining chip. Nevertheless, we rejected the UAW's request to enter a permanent injunction because the issue came to us from a directed verdict and that "precluded Mack from introducting evidence to counter the union's case." *International Union*, 820 F.2d at 98.

On remand, Mack sought to introduce evidence on the breach of contract issue. Mack wanted to prove that the term "alternative delivery system" was ambiguous and did not mean "carrier" or "provider" as asserted by the UAW. The UAW sought to prevent Mack from introducing this evidence. It argued that our decision on appeal prevented Mack from relitigating the issue. The district court disagreed with the UAW and admitted Mack's evidence.

When trial resumed, the chief spokesperson for Mack

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[2] Although the district court and the parties referred to Mack's motion as a Rule 50 motion, the trial was non-jury, and the proper motion would have been under Rule 41(b). Rule 50 applies to jury trials; Rule 41(b) applies to non-jury trials. *Lestino v. Fringe Employee Plans, Inc.*, 611 F.2d 474 (3d Cir. 1979). But this is of no consequence. When either motion is denied or reversed on appeal, the process is the same—the trial continues.

on the Joint Subcommittee on Benefits testified that the terms "provider" and "carrier" were changed to "alternate delivery system" because the terms were not synonymous. Mack's spokesperson stated that he wanted the change "to assure that the company would have the option of switching to another insurance carrier, as long as the insurance carrier provided benefits on a fee for service basis and on the same terms and conditions as Blue Cross/Blue Shield." *International Union, UAW v. Mack Trucks, Inc.*, 733 F. Supp. 938, 944 (E.D. Pa. 1990). Also, Mack's expert in the field of employee benefits and health care testified that "delivery system" had a special meaning in the health care field—that the term refers to the manner in which health care insurance coverage is provided by, for example, a fee for service system, a health maintenance organization (HMO), or a preferred provider organization (PPO). The UAW did not rebut Mack's evidence of ambiguity, or the meaning of the term "delivery system."

After hearing all the evidence, the district court entered judgment in favor of Mack. The court first held that the language of the contract was ambiguous because it was reasonably susceptible to different meanings. It based its conclusion on the fact that during negotiations, the terms "provider" and "carrier" were changed to "alternate delivery system" and that, therefore, the term "alternate delivery system" could not mean the same as "carrier" or "provider" as argued by the UAW. The district court next found that the parties intended the term to mean that Mack could unilaterally change the health insurance carrier so long as the new carrier provided benefits in the same manner and extent as the old carrier. The court found the testimony of Mack's witnesses to be credible. The court also noted that the UAW failed to contest this testimony on rebuttal.

II.

The first issue is whether the district court erred by permitting Mack to assert and present evidence on remand that it did not breach the contract. The UAW claims Mack is barred from challenging the breach of contract finding the district court made in its directed verdict because Mack did not challenge that finding on appeal, and the Court of Appeals stated in its opinion that Mack's actions violated the contract. These issues are essentially legal and require that we interpret the rules of civil procedure. Therefore, our review is plenary. *Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir. 1986).

Both UAW contentions disregard the procedural posture of the appeal. Under Fed. R. Civ. P. 41(b) Mack retained the right to present evidence if the court of appeals reversed. *Federal Deposit Ins. Corp. v. Mason*, 115 F.2d 548 (3d Cir. 1940). In *Federal Deposit*, we held that a defendant in a non-jury trial who, pursuant to Rule 50, is granted a directed verdict subsequently reversed on appeal, shall upon remand be afforded an opportunity to present evidence as if the verdict had been denied by the district court. 115 F.2d at 552.

Statements in our opinion in UAW's first appeal in this case do not prevent Mack from presenting its "no breach" argument on remand. We said:

> Mack appears to concede that it (in the district court's words) "breached the collective bargaining agreement by changing its health insurance carrier from Blue Cross/Blue Shield to Equitable without the consent of the UAW." Slip op. at 9. We, therefore, find it beyond dispute that Mack indeed violated its contract . . . We need only to decide the legal question of whether the Union adduced evidence of harm sufficient to make out a *prima facie* case and, therefore, to avoid a directed verdict.

International Union, 820 F.2d at 95.

The UAW rests its argument on this language, but fails to take our concluding paragraph into account:

> We conclude that the district court erred in granting Mack's motion for a directed verdict and, therefore, will vacate its judgment. The Union came forward with proof that Mack's decision to change unilaterally the health insurance carrier violated the collective bargaining agreement and caused the Union substantial harm by depriving it of a bargaining chip which the Union might trade for other Mack benefits. . . . However, we will not (as the UAW requests) order the district court presently to grant [a permanent injunction], since the directed verdict precluded Mack from introducing evidence to counter the Union's case. Accordingly, we will remand this case for further proceedings.

Id. at 98.

In this concluding paragraph we recognized that Mack retained the right to present its case following its motion for a directed verdict. Under both Rule 50 and Rule 41(b), a defendant moving for a directed verdict retains the right to present evidence against the plaintiff's case whether its motion is denied at the trial or appellate level. We said this before in *Federal Deposit*, *supra*, and we reaffirm it today. We conclude that Mack is not attempting to relitigate an issue disposed of by this Court's prior opinion in this case. *See Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985) ("upon a reversal and remand for further consistent proceedings, the case goes back to the trial court and there stands for a new determination of the issues presented as though they had not been determined before, pursuant to the principles of law enunciated in the appellate opinion, which must be taken as the law of the case.")

III.

The second issue presented by this appeal is whether the district court properly found the language of the agreement to be ambiguous. Determining whether contract terms are clear or ambiguous is a question of law requiring plenary review. *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 101 (3d Cir. 1986). While our interpretation of a collective bargaining agreement is governed by substantive federal law, traditional rules of contractual interpretation apply where not inconsistent with federal labor policies. *H.C. Lawson, Jr., Inc. v. Truck Drivers, Chauffeurs*, 755 F.2d 324, 328-29 n.3 (3d Cir. 1985).

> Ambiguity is:
>
> Intellectual uncertainty; . . . the condition of admitting of two or more meanings, of being understood in more than one way, or referring to two or more things at the same time . . .

Mellon Bank N.A. v. Aetna Business Credit, 619 F.2d at 1001, 1011 (3d Cir. 1980), citing Webster's Third New International Dictionary (unabr. 1971). "In making the ambiguity determination, a court must consider the words of the agreement, alternative meanings suggested by counsel, and extrinsic evidence offered in support of those meanings." *Kroblin*, 805 F.2d at 101. "If a reasonable alternative interpretation is suggested . . . objective evidence in support of that interpretation should be considered by the factfinder." *Mellon Bank*, 619 F.2d at 1011. It is for the trial judge to "hear the proffer of the parties and determine if there are "objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of different meanings." *Mellon Bank*, 619 F.2d at 1011. These propositions are not inconsistent with federal labor policy.

The parties each advanced different meanings for the term "alternative delivery system." The Union makes a

textual argument by looking at the contract language alone. It contends that the term "delivery system" is synonymous with the term "carrier." The Union offered no evidence to support its interpretation of the term.

Mack contends that the term "delivery system" means "a system or manner of delivering health insurance benefits as opposed to the organization or company that provides those benefits." *International Union*, 733 F. Supp. at 947. Mack offered into evidence the testimony of its chief spokesperson who was present at the critical meeting on November 1, 1984 when the term "delivery system" was actually inserted into the contract. He gave examples of alternative delivery systems and explained why the terms "provider," "carrier," and "alternative delivery systems" are not synonymous. He testified that Mack suggested replacing the term "provider" with "delivery system" because it wanted to make sure that the language in the contract would permit the company to change insurance carriers so long as the new carrier delivered the group health benefits on a fee-for-service system and provided the same terms and conditions of coverage as Blue Cross/Blue Shield.

The district court concluded that the term "alternative delivery system" was ambiguous because it was susceptible of different meanings. We believe the district court advanced sufficient factors to support its holding. In making its determination, the district court reviewed the circumstances of the negotiations which led the parties to insert this language. The district court scrutinized the language proposed by Mack, the reasons for the language and why it was inserted into the contract. It examined all extrinsic evidence proffered. We find nothing to suggest that this term is capable of only one meaning and, therefore, we conclude the district court did not err in finding the term to be ambiguous.

IV.

Finally, we must decide whether the district court's factual findings as to what the parties meant by this phrase is clearly erroneous. *Ram Construction Co., Inc. v. American States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984).

The district court first considered "extrinsic evidence to ascertain the intent of the parties when they adopted and approved Article I, Section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement." App. 225. Mack was the only party to present any extrinsic evidence as to just what took place at the critical negotiation meeting over the phrase "alternative delivery system." The UAW presented no evidence as to what took place at this meeting and instead chose to rely on what the district court characterized as a "textual argument that the plain meaning of the words show that a delivery system is an insurance carrier." App. 226. Upon this evidence the court interpreted "alternative delivery system" to mean "a delivery system other than the traditional fee-for-service system." App. 227. We find no error. The interpretation offered by Mack and found by the district court is the only one supported by the evidence.

The district court concluded that Mack did not breach its agreement with the UAW. We agree. The court's interpretation of the contract would properly allow Mack to unilaterally change from Blue Cross to another fee-for-service health insurance carrier so long as the new carrier's insurance plan contained the same terms and conditions as the Blue Cross plan. The Equitable plan meets this test. We will affirm.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1192

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
International Union, UAW, Appellant

vs.

MACK TRUCKS, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 85-7417)

Present: HUTCHINSON, NYGAARD, *Circuit Judges* and RE, *Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel August 27, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

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* Hon. Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

District Court entered February 12, 1990, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ [Illegible]
Clerk

October 18, 1990

Certified as a true copy and issued in lieu of a formal mandate on November 9, 1990

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 86-1565

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Appellant,

v.

MACK TRUCKS, INC.

Argued March 16, 1987

Decided June 5, 1987

Richard H. Markowitz (argued), R. David Walk, Jr., Phiiadelphia, Pa. (Jordan Rossen, Gen. Counsel, Leonard R. Page, Associate Gen. Counsel, International Union, United Auto., Aerospace and Agr. Implement Workers of America—UAW, Detroit, Mich., of counsel), for appellant.

Carol A. Mager (argued), Maureen M. Rayborn, Montgomery, McCracken Walker & Rhoads, Philadelphia, Pa., for appellee.

Before HIGGINBOTHAM, MANSMANN and ROSEN, Circuit Judges.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

This matter comes before us on appeal from an order of the district court which granted the motion of the defendant, Mack Trucks, Inc. ("Mack"), for a directed

verdict in this action by the plaintiff—International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("UAW" or "the Union")—to enforce the parties' collective bargaining agreement pursuant to § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1982). The district court concluded as a matter of law that "[t]he Union has failed to demonstrate that its members have been harmed by Mack's technical violation of the contract" and, therefore, refused to issue a permanent injunction in the Union's favor. *UAW v. Mack Trucks, Inc.*, No. 85-7417, slip op. at 9 (E.D.Pa. Aug. 28, 1986) (hereinafter "slip op.") [Available on WESTLAW, DCT database]. We possess jurisdiction pursuant to 28 U.S.C. § 1291 (1982). We agree with the district court that Mack's decision to change unilaterally the health insurance carrier for its employees violated Mack's collective bargaining agreement with the UAW. We find, however, that the Union carried its burden of proving irreparable harm. Because the district court rested its directed verdict and consequent denial of injunctive relief on an erroneous finding of injunctive relief on an erroneous finding of ultimate fact, we will vacate the judgment of the district court and will remand this case for further proceedings.

I.

The collective bargaining agreement between the Union and Mack provides that Mack will pay for health insurance benefits to its union employees. Prior to 1984, the parties had specified Blue Cross/Blue Shield as the health insurance carrier. However, during negotiations in 1984, officers and employees of the Union expressed to Mack officials that some union members were dissatisfied with Blue Cross/Blue Shield. The UAW subsequently proposed a means to permit Mack to replace the health insurance carrier under certain conditions during the term of the new contract. According to the Union, it suggested the proposal in order to secure better quality health insurance

services for the UAW membership while simultaneously precluding Mack from modifying unilaterally the terms of the benefits package.

Under the UAW's plan, the parties would detail the terms and conditions of the health insurance program which the carrier would provide. Although Mack initially responded favorably to the Union's offer, the parties failed to reach an agreement. Mack then offered to continue the terms and conditions of the existing health insurance program with a carrier of Mack's choosing. The Union countered with the following:

> The terms and conditions of coverage, including those amendments made in these negotiations, are continued on the assumption that the current arrangement with Blue Cross/Blue Shield will continue for the term of the labor agreement. The Company shall not exercise its option to select an alternate *delivery system* until the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any *delivery system* other than Blue Cross/Blue Shield.

On November 7, 1984, the parties initialed this proposal which became part of Appendix B to their master labor agreement effective October 30, 1984.

On June 11, 1985, the UAW-Mack Benefits Committee met to discuss health insurance benefits issues. Mack advised the Union that, *inter alia*, Mack was soliciting bids from various health insurance plans. Union representative Jack Derry thereupon reminded Mack's representatives that the parties had to agree mutually on the terms and conditions of any delivery system before Mack could select a provider other than Blue Cross/Blue Shield. Nonetheless, Mack's Dennis Guinan informed the Union at a meeting in Detroit on November 4, 1985 that Mack had tentatively selected the Equitable Life Assurance Society ("Equitable") to assume the insurance program on January 1, 1986. The Union again objected.

On November 18, 1985, the parties met at Equitable's Regional Benefits Center in Columbus, Ohio. At that meeting, the Union asked Mack to delay implementing the conversion to Equitable, since the UAW required more time to study the change and to resolve pertinent unanswered questions. The Union also stated that Mack's decisions to close its Allentown, Pennsylvania plant and to outsource work from its Hagerstown, Maryland facility demanded the Union's immediate attention. Mack nonetheless sent the Union a letter on December 6, 1985 addressing questions raised at the Columbus meeting. Three days later, Mack formally notified the UAW that effective January 1, 1986 Mack "will exercise its option . . . to replace the present insurance carriers for our group insurance coverage under the Agreement with Equitable."

Union representatives immediately presented written grievances to Mack on December 10 and 16, 1985 protesting its actions. Again on December 16, 1985, the UAW by letter reminded Mack of the requirement in Article I, Section 2 of the insurance agreement that Mack could not change insurance carriers until "the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any [other] *delivery system* . . . ." The UAW further pledged to meet with Mack "at the earliest possible mutually convenient time" to resolve these issues. On December 19, 1985, Mack responded to the Union's letter and indicated that the terms and conditions of the UAW's existing insurance coverage would not be reduced with Equitable. Mack offered, accordingly, to furnish the UAW with a comparative breakdown of the Blue Cross/Blue Shield and Equitable plans by February 15, 1986 and to answer the Union's questions in the interim. The Union responded by filing a complaint and a motion for a preliminary injunction on December 26, 1985 to stop Mack from switching to Equitable.

On December 30, 1985, the parties entered into a stipulation and order whereby the plaintiff withdrew its mo-

tion for a preliminary injunction. In return, the defendant formally promised to provide a complete comparative breakdown of the two insurance programs, to which the UAW would respond in writing. The parties additionally agreed to discuss outstanding problems until the date of trial, if trial proved necessary. On January 1, 1986, Mack replaced Blue Cross/Blue Shield with Equitable.

Mack sent to the Union a "Comparative Document for the Mack-UAW Insurance Program" on January 17, 1986. The UAW responded ten days later with a request for additional documents by which to compare the old and new insurance plans. On January 31, 1986, the parties met to discuss inadequacies which the Union found in the comparative breakdown. Mack and the UAW continued to exchange correspondence throughout the ensuing two months.

Finally, on April 21, 1986, the Union notified Mack that the Union would not accept the terms and conditions of coverage with Equitable. Moreover, the UAW reiterated its "principal concern" that "the Company does not have the right under the terms of the collective bargaining agreement to make a change in insurance carriers in a unilateral fashion without the agreement and consent of the Union."

On August 19 and 20, 1986, the district court held a non-jury trial on the Union's complaint and accompanying request for a permanent injunction to require Mack to reinstate the Blue Cross/Blue Shield health insurance plan. At the close of the plaintiff's case, Mack moved for a directed verdict pursuant to Fed.R.Civ.P. 50(a). The defendant argued that the UAW had failed to prove that Mack had breached the collective bargaining agreement and that, in any event, the Union had not shown irreparable harm as a result of the change from Blue Cross/Blue Shield to Equitable. The Union responded that it need not demonstrate irreparable harm to obtain a permanent injunction; rather, it had to (and did) prove a breach

of the collective bargaining agreement and a balance of the equities favoring the relief sought. In rebuttal, Mack urged that the terms and conditions of the two insurance plans were identical and that the Union had suffered no harm from Mack's actions.

The district court granted the motion for a directed verdict. The court found that "at best the union has established a technical violation of the collective bargaining agreement." The UAW also failed, in the court's view, to show that any substantial benefit would result from a permanent injunction in its favor. In a subsequent written opinion, the district court "agree[d] with the UAW that Mack failed to comply with the provisions of the insurance program agreement, but [did] not find that the balance of the equities tips in favor of an injunction." Slip op. at 6. The Union's timely appeal followed.

II.

On appeal, the Union argues that the district court erred in granting Mack's motion for a directed verdict, since sufficient evidence of substantial harm to the Union as a result of Mack's breach of the collective bargaining agreement existed in the record to support the issuance of a permanent injunction. The Union accordingly asks us to direct the district court to grant the Union's motion for injunctive relief.

We generally measure a trial court's grant or denial of a motion for an injunction by an abuse of discretion standard. We more closely review decisions on requests for permanent rather than for preliminary relief, however, since permanent injunction cases present more fully developed records. *See International Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733, 737, *amended at* 789 F.2d 1319 (9th Cir.), *and cert. granted*, —— U.S. ——, 107 S.Ct. 312, 93 L.Ed.2d 286 (1986); *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir.1982). An abuse of discretion exists

where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. *See International Olympic Comm.*, 781 F.2d at 738.

Here, the district court labeled Mack's violation of the collective bargaining agreement merely "technical" as a matter of law. This conclusion represents a finding of "ultimate fact" since harm is requisite to the merits of the Union's claim and, therefore, to the injunction itself. *See CIBA-GEIBY Corp. v. Bolar Pharmaceutical Co.*, 747 F.2d 844, 850 (3d Cir.1984), *cert. denied*, 471 U.S. 1137, 105 S.Ct. 2678, 86 L.Ed.2d 696 (1985). In reviewing the ultimate issue of harm

> as an appellate court, we are therefore not limited by the "clearly erroneous" standard, [citation omitted], but must employ a mixed standard of review. We must accept the trial court's findings of historical or narrative fact unless they are clearly erroneous, [footnote omitted] but we must exercise a plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts. [Citations omitted.] Thus we separate the distinct factual and legal elements of the trial court's determination of an ultimate fact and apply the appropriate standard to each component.

Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 103 (3d Cir.1981). In order for harm to warrant a permanent injunction, of course, the plaintiff must show the lack of an adequate remedy at law.

III.

Mack appears to concede that it (in the district court's words) "breached the collective bargaining agreement by changing its health insurance carrier from Blue Cross/Blue Shield to Equitable without the consent of the UAW." Slip op. at 9. We, therefore, find it beyond dispute that Mack indeed violated its contract "not [to]

exercise its option to select an alternate *delivery system* until the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any *delivery system* other than Blue Cross/Blue Shield." We need only to decide the legal question of whether the Union adduced evidence of harm sufficient to make out a *prima facie* case and, therefore, to avoid a directed verdict.

A.

We find as a matter of law that the district court erred in holding that Mack's breach of the collective bargaining agreement has not harmed the Union.

Article I, Section 2 of the collective bargaining agreement as amended requires the Union to agree to proposed terms and conditions before Mack is able to substitute another health insurance carrier for Blue Cross/Blue Shield. Nothing in that provision, however, empowers Mack to force the Union to accede to "an alternate delivery system," even if its terms and conditions surpassed those which the Union enjoyed with Blue Cross/Blue Shield. The UAW thus possessed a bargaining chip which the Union might trade for other benefits from Mack. By unilaterally replacing Blue Cross/Blue Shield with Equitable, Mack deprived the union of its bargaining chip. The district court's holding that Mack had not harmed the UAW overlooks the importance of the "mutual agreement" provision to the collective bargaining process.

The record proves that Mack deprived the Union of the benefit of its bargain as expressed in the collective agreement. During negotiations in October of 1984, Mack proposed to replace the Blue Cross/Blue Shield health insurance plan with coverage "arranged at the Company's sole discretion, in any manner or through any organization. . . ." Union representative John Collins testified that the UAW countered by authorizing

Mack to change carriers so long as the parties would delineate in the agreement the terms and conditions which any plan must contain. According to Collins, the Union had negotiated contracts with other employers, which detailed the terms and conditions of insurance coverage. When the parties realized that they would not resolve the matter before the existing contract expired, they agreed to maintain the status quo until they could agree upon the terms and conditions that would apply "to any *delivery system* other than Blue Cross/Blue Shield."

That amendment, in other words, secured the Union's right to force Mack to bargain concerning the scope of its health insurance program before changing carriers. The fact that Equitable and Blue Cross/Blue Shield benefits may be coextensive does not, therefore, excuse Mack's violation of the collective bargaining agreement. Accordingly, the district court's finding of ultimate fact that Mack's breach of contract was merely "technical" and harmless is legally erroneous. It is manifest, moreover, that the sort of harm which the Union demonstrated would (should the Union prevail) be compensable only by a permanent injunction.

B.

Our conclusion gathers further support from the unique role which collective bargaining contracts play in the field of labor-management relations. As we recently observed in *Griesmann v. Chemical Leaman Tank Lines*, 776 F.2d 66 (3d Cir.1985), "a collective bargaining agreement differs 'in nature, scope, and purpose from the ordinary commercial contract.'" *Id.* at 71, *quoting Syufy Enter. v. Northern California State Assoc. of IATSE Locals*, 631 F.2d 124, 125-126 (9th Cir.1980) (per curiam), *cert. denied*, 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981). The Supreme Court in an analogous context similarly emphasized the *sui generis* character of these contracts:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. [Citation omitted.] The collective agreement note omitted.] It calls into being a new common law—the common law of a particular industry or of a particular plant.
>
> . . . A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationships they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-80, 80 S.Ct. 1347, 1350-51, 4 L.Ed.2d 1409 (1960).

Consequently, the collective bargaining table will not normally seat the notion of a "technical" contract violation. Each covenant in a collective agreement represents a *quid pro quo*, and we must strictly adhere to the letter of the parties' bargain in view of the spirit which effects it: the expectation that the contract will be enforced. We need not decide, however, whether a breach of a collective bargaining agreement can ever be harmless or "technical" because the facts before us show that Mack has deprived the Union of a valuable "bargaining ship," clearly a matter of substance and not a mere "technicality."

IV.

Mack insists, nonetheless, that the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982 & Supp.III 1985), precludes the issuance of a permanent injunction in favor of the Union. We hold, however, that the district court possesses jurisdiction to grant the injunction.

Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.[1]

29 U.S.C. § 101 (1982). Mack cites only § 8 of the Act in attacking the district court's jurisdiction.[2]

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[1] Title 29 U.S.C. 102 (1982) declares the public policy in labor matters:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

[2] Section 8 states:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation

Yet, as the Court of Appeals for the Ninth Circuit wrote in an analogous context:

> We do not think that an order directing an employer to comply with a collective bargaining contract, in a setting in which none of the things described in the Norris-LaGuardia Act occurred, even though it might technically be called an injunction, is the kind of an injunction contemplated by that Act. It certainly does not fall within the purposes of the Act as stated in section 2 (29 U.S.C. § 102).
>
> * * * * *
>
> In this case we have a "labor dispute," as defined in section 13, only in the most refined and technical sense. There is nothing in the complaint to suggest that either party is here using its economic powers in any way to bring pressure upon the other. Here, there is a mere disagreement as to the meaning and effect of certain terms of the contract. This we think, is not the type of "labor dispute" to which Norris-LaGuardia is directed.

Retail Clerks Union Local 1222, AFL-CIO v. Alfred M. Lewis, Inc., 327 F.2d 442, 446-48 (9th Cir.1964).

Our decision in *Independent Petroleum Workers of New Jersey v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir.1956), is likewise instructive. There, the labor union sued under 29 U.S.C. § 185 to compel, *inter alia*, specific performance of a collective bargaining agreement provision which required the employer to negotiate the salary rate for any newly established job classification. The district court held that the defendant's alleged refusal to negotiate was an unfair labor practice subject

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> imposed by law which is involved in the labor dispute in question, or who has *failed to make every reasonable effort to settle such dispute either by negotiation* or with the aid of any available governmental machinery of mediation.

29 U.S.C. § 108 (1982) (emphasis added).

to the exclusive jurisdiction of the National Labor Relations Board and, accordingly, dismissed that count. On appeal, we reversed the district court's judgment and concluded:

> If . . . a particular act is the subject of an agreement between employer and union and the union sues [under Sec. 301(a)] for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only breach of contract but also an unfair labor practice.

Id. at 405, *quoting Reed v. Fawick Airflex Co.*, 86 F. Supp. 822, 823-24 (N.D. Ohio 1949).

As well, we noted that "the Norris-LaGuardia Act cannot be construed as an immutable and inflexible bar against injunctive relief because of the circumstance that a union is one of the parties in the litigation[.]" 235 F.2d at 404. Finally, we adopted the view of the Court of Appeals for the Sixth Circuit that "the unqualified use of the word 'suits'[3] in the Labor Management Relations Act *authorizes injunctive process for the full enforcement of the substantive rights created by section 301(a). . . .*" *Id., quoting Milk and Ice Cream Drivers v. Gillespie Milk Products Corp.*, 203 F.2d 650, 651 (6th Cir. 1953).

We reaffirm *Esso Standard Oil Co.* and hold that the Norris-LaGuardia Act does not bar the UAW's action for a permanent injunction.

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[3] *Suits* for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the ciizenship of the parties.

29 U.S.C. § 185(a) (1982) (emphasis added).

V.

We conclude that the district court erred in granting Mack's motion for a directed verdict and, therefore, will vacate its judgment. The Union came forward with proof that Mack's decision to change unilaterally the health insurance carrier violated the collective bargaining agreement and caused the Union substantial harm by depriving it of a bargaining chip which the Union might trade for other Mack benefits. Furthermore, nothing in the Norris-LaGuardia Act would deprive the district court of jurisdiction to award the Union a permanent injunction. However, we will not (as the UAW requests) order the district court presently to grant that relief, since the directed verdict precluded Mack from introducing evidence to counter the Union's case. Accordingly, we will remand this case for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 85-7417
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

v.

MACK TRUCKS, INC.

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW, AND ORDER

[Filed Feb. 12, 1990]

HUYETT, J. February 8, 1990

Plaintiff International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW" or "the Union") brought this equitable action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The Union seeks a permanent injunction to prevent defendant Mack Trucks, Inc. ("Mack" or "the Company") from changing the health insurance carrier that provides coverage for its employees without the mutual consent of the Union.

I. INTRODUCTION

The UAW filed this complaint along with a motion for a preliminary injunction on December 26, 1985. It sought to enjoin Mack from implementing a proposed change from health insurance coverage with Blue Cross/Blue Shield to Equitable Life Assurance Society ("Equi-

table")[1]. The UAW contended that, under the terms of the collective bargaining agreement between the parties, Mack could not change its health insurance carrier without the Union's consent.

After negotiation, the Union withdrew its motion for a preliminary injunction, and the parties agreed to exchange information and to meet to discuss the planned shift to Equitable. The UAW sought to submit the dispute to binding arbitration, but Mack contended that the dispute was not subject to arbitration under the collective bargaining agreement.

After further negotiations, it appeared that the parties could not resolve their differences. This action thus proceeded to a non-jury trial on the issue of whether the UAW was entitled to a permanent injunction. After the UAW rested its case and Mack moved for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, I granted Mack's motion in a ruling from the bench.

Later, I issued Findings of Fact, Discussion, and Conclusions of Law which set forth in more detail my reasoning for granting the directed verdict in favor of Mack. Based only on evidence submitted by the UAW, I concluded that Mack breached the collective bargaining agreement by changing its health insurance carrier from Blue Cross/Blue Shield to Equitable without the consent of the UAW. Nonetheless, I concluded that the UAW failed to demonstrate that its members were harmed by Mack's technical violation of the contract and, considering the equities, the UAW was not entitled to a permanent injunction.

The UAW appealed, and, in an opinion dated June 5, 1987, the Third Circuit Court of Appeals held that the UAW was harmed because it had lost a bargaining chip,

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[1] Equitable Life Assurance Company is now called Equicor. *See* 1989 Trial Transcript at 28.

which could have been traded for other benefits from Mack. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir. 1987). Therefore, the court concluded that the Union had established sufficient evidence of harm to make out a prima facie case necessary for a permanent injunction and, thus, that I erred in directing a verdict against the Union and in favor of the Company. *Id.* at 98. In remanding the case for further proceedings, the court stated that "we will not (as the UAW requests) order the district court presently to grant that [equitable] relief, since the directed verdict precluded Mack from introducing evidence to counter the Union's case." *Id.* at 98.

On October 4, 1989, Mack presented its case to this court with four witnesses. In rebuttal, the UAW presented one witness, Jack Derry, an International Representative of the UAW.

Upon consideration of all the evidence, as well as the parties' pre-trial submissions and post-trial submissions, I now conclude that Mack did *not* breach the collective bargaining agreement by changing its health insurance carrier from Blue Cross/Blue Shield to Equitable without the consent of the UAW. What follows are my findings of fact, discussion, and conclusions of law in support of this conclusion.

II. FINDINGS OF FACT

A. *Background and Parties*

1. Plaintiff, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, is an unincorporated association, commonly known as a labor union, with offices located at 8000 East Jefferson Avenue, Detroit, Michigan. The UAW is a labor organization representing employees in

an industry affecting commerce within the meaning of Section 2(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(5). [Stipulation No. 1]

2. Defendant, Mack Trucks Inc., is a Pennsylvania corporation with offices located at 2100 Mack Boulevard, Allentown, Pennsylvania. Mack is an employer engaged in an industry affecting commerce within the meaning of section 2(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(2). [Stipulation No. 2]

3. At the time this lawsuit was filed, Mack and the UAW were parties to a master collective bargaining agreement and several local collective bargaining agreements which covered the terms and conditions of employment for certain employees of Mack. The master agreement in effect when this lawsuit was filed was by its terms effective from October 30, 1984 to May 4, 1987. [Stipulation No. 3]

4. The life, disability, and health insurance programs in effect for the UAW employees under the 1984 Master Agreement are set forth in Appendix B of the Master Agreement [Defendant's Exhibit 2], as modified by the documents negotiated and agreed to by the Union and Mack and signed on November 7, 1984. [Defendant's Exhibit 6].

5. On May 4, 1987, the 1987 Master Agreement superseded the 1984 Master Agreement. The provisions of the 1984 Master Agreement that apply to this lawsuit are unchanged in the 1987 Master Agreement. The 1987 Master Agreement is by its terms effective until October 27, 1992. [Stipulation No. 3].

6. The Appendix B life, health, and disability insurance program covers approximately 6,900 active employees and their families and approximately 3,300 retirees or surviving spouses of Mack retirees. [Stipulation No. 6].

7. Prior to the 1984 Master Agreement, Appendix B of the Master Agreement contained two provisions that restricted Mack's right to select the insurance carrier for its health benefits program. First, Article I, section 2 provided that the Company would "continue in force for the duration of this Program its present group insurance contracts and Blue Cross/Blue Shield contracts." [Plaintiff's Exhibit 2, p. 121]. Second, Article III, sections 1, 2, and 3 provided that the parties could, by mutual agreement, substitute specific benefit plans of other organizations providing the same benefits as those provided by Blue Cross/Blue Shield. [Plaintiff's Exhibit 2, pp. 151, 152, & 153-154; *see also* Stipulation No. 5].

B. *Employee Benefit Terminology*

8. A "provider," in the nomenclature of employee benefits and health care, is a medical practitioner, like a physician, or an organization, like a hospital, that delivers medical treatment or care. [1989 Trial Transcript at 12].

9. A "carrier," in the nomenclature of employee benefits and health care, is an organization that an employer works with to either administer or both administer and insure a health benefits plan for employees. [1989 Trial Transcript at 11]. Typically, a carrier is a commercial insurance company. [1989 Trial Transcript at 11]. Blue Cross/Blue Shield and the Equitable are examples of carriers. [1989 Trial Transcript at 68].

10. A "fee-for-service plan" or "traditional plan," in the nomenclature of employee benefits and health care, is an indemnity type of medical plan in which the carrier pays fees either to providers who have rendered services to covered beneficiaries or to beneficiaries who have already paid the provider for services covered under the plan. Under a fee-for-service plan, an employee or other beneficiary is free to choose his or her own health care provider. [1989 Trial Transcript at 12].

11. An "alternate delivery system," in the nomenclature of employee benefits and health care, is a managed health care plan that delivers cost-effective health care by restricting the freedom of the employee or other beneficiary to select his or her own health care provider and also by controlling access to health care by utilization of review, second opinions, and similar means. [1989 Trial Transcript at 13-14]. A health maintenance organization ("HMO") and a preferred provider organization ("PPO") are examples of alternative delivery system. [1989 Trial Transcript at 13].

12. The terms "carrier" and "delivery system" are *not* synonyms and are *not* used interchangeably in the employee benefits and health care field. [1989 Trial Transcript at 14-15]. However, it is customary practice for a carrier to establish or sponsor an alternative deliver system, either at a specific client's request or on a speculative basis in order to attract customers and sell insurance products. [1989 Trial Transcript at 15].

C. *The 1984 Mack-UAW Master Agreement Negotiations*

13. In 1984, Mack undertook an evaluation of its health insurance programs as the result of significant increases in the costs that it had been experiencing under its health benefits administration contract with Blue Cross/Blue Shield. [1989 Trial Transcript at 70-72]. Mack retained the consulting firm of Deloitte, Haskins & Sells to assist in its evaluation and to provide it with recommendations on how to deliver health care benefits on a more cost effective basis. [1989 Trial Transcript at 17; Defendant's Exhibit 7].

14. In late August or early September of 1984, the Company met with Deloitte, Haskins & Sells to discuss recommendations with respect to Mack's health benefits plan. [1989 Trial Transcript at 19-20]. Deloitte, Haskins & Sells made recommendations in four general

categories. In the area of aduministration and funding, the consulting firm recommended that Mack convert to a self-insured arrangement and competitively bid for the services of an insurance carrier to administer its health benefits plan. [1989 Trial Transcript at 18].

15. After this meeting with Deloitte, Haskins & Sells, the Company decided that one of its main goals during the upcoming negotiations was to secure the right to make a unilateral change in carriers. [1989 Trial Transcript at 22-23].

16. In negotiaitons that began in September 1984 and ended in November 1984, Mack and the UAW agreed on Appendix B of the 1984 Master Agreement. During negotiations, the parties delegated the work on Appendix B and related letter agreements to a Joint Subcommittee on Benefits, which met numerous times during the negotiations. [1989 Trial Transcript at 65; Stipulation No. 8]. The chief spokesperson for Mack on the Joint Subcommittee on Benefits was William J. Gmitter; the chief spokesperson for the UAW was John Collins, a staff employee of the International Union. [1989 Trial Transcript at 65-66]. Manfred Bittkau, a UAW benefits specialist, participated in the negotiations to assist Collins. [1989 Trial Transcript at 94]. Mr. Bittkau has more than 30 years of experience in employee benefits and is sophisticated and fell-versed in the area. [1986 Trial Transcript at 1.136-1.138].

17. During the 1984 negotiations, Mack presented to the UAW the need to contain the costs of the health benefits offered to its employees, dependents and retirees. [1986 Trial Transcript at 1.7 & 1.108]. The Company suggested alternative cost-efficient methods for delivering health benefits, specifically the establishment of a preferred provider organization (PPO) in the areas in which Mack's employees were so numerous as to constitute a significant market factor. [Defendant's Exhibit 4]. The Company wanted the UAW to agree to allow it to offer

alternative delivery systems in addition to the fee-for-service system, which was the system currently in place and offered through Blue Cross/Blue Shield. [1989 Trial Transcript at 90]. The Company did not desire to replace the fee-for-service system, but merely desired to offer alternative systems that would be optional with its employees. [1989 Trial Transcript at 90].

18. The Union's response to the Company's idea of offering alternative delivery systems was generally that the Union was not so much concerned with how and through what organization(s) the Company arranged for health benefits. Rather, the Union was primarily concerned with the terms and conditions of coverage that would relate to the benefits of the insurance coverage, regardless of the delivery system through which the insurance coverage was offered. [1986 Trial Transcript at 1.8]. Ultimately, the Union desired to include in one place in the Collective Bargaining Agreement all of the terms and conditions that would relate to the benefits of the insurance coverage. [1986 Trial Transcript at 1.8]. After that was accomplished the Union stated that it would have no problem with granting the Company sole discretion in deciding through which organizations to secure insurance coverage as well as the types of delivery systems to offer. [1986 Trial Transcript at 1.8].

19. Prior to and during the negotiations for the 1984 Master Agreement, officers and employees of the UAW expressed to Company representatives dissatisfaction with the quality of service being provided by Blue Cross/Blue Shield. [Stipulation No. 7]. Therefore, Jack Derry, a representative of the International Union, requested the Company to remove language in Appendix B requiring the Company to contract with Blue Cross/Blue Shield. [1989 Trial Transcript at 77]. The Company's response to this request was favorable because the Company did not want to be bound by the collective bargaining agreement to one particular organization or one particular sys-

tem of delivering health benefits. [1989 Trial Transcript at 77-78].

20. Both the Company and the Union submitted proposals to replace the language in the 1980 Master Agreement that required the Company to contract exclusively with Blue Cross/Blue Shield. The Union submitted a Letter of Understanding. [Defendant's Exhibit 5(c), p. 10]. The Company submitted a document entitled "Language to Remove Reference to Insurance Carriers," dated October 19, 1904. [Plaintiff's Exhibit 3].

21. During one of the meetings of the Joint Subcommittee on Benefits, Mr. Gmitter asked Mr. Collins whether it would be necessary for the Union to ratify a change in carriers. [1989 Trial Transcript at 82]. Mr. Collins told Mr. Gmitter that a change in carriers would not require ratification by the membership of the UAW. [1989 Trial Transcript at 82-83].

22. On October 19, 1984, the Joint Subcommittee on Benefits met and discussed the proposals submitted by the parties. The result of the negotiations at that meeting was a merger of the two documents. [1989 Trial Transcript at 81; Defendant's Exhibit 5(c), pp. 9-10].

23. On October 20, 1984, the Union went on strike[2]. [1989 Trial Transcript at 67 & 81]. During the strike, the Company and the Union did not continue negotiating the language of Article I, section 2 of Appendix B. [1989 Trial Transcript at 81-82].

24. On November 1, 1984, immediately following the settlement of the strike and approval of the main body of the 1984 Master Collective Bargaining Agreement, the Company and the Union met to continue negotiating

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[2] It is not clear from the record why the Union went on strike on October 20, 1984. It does appear, however, that the strike was *not* related to the negotiations with respect to Article 1, section 2 of Appendix B of the 1984 Master Agreement—the contract language at issue in this action.

the language contained in Article I, section 2 of Appendix B. [1989 Trial Transcript at 83]. By virtue of those negotiations, the document marked Defendant's Exhibit 25 resulted, which is the merger of the proposals submitted by the parties prior to the strike and discussed at the meeting on October 19, 1984, along with three changes of terminology made at the meeting on November 1, 1984. [Defendant's Exhibit 5(c), pp. 9-10; Defendant's Exhibit 25; 1989 Trial Transcript at 86].

25. Present at the meeting on November 1, 1984 of the Joint Subcommittee on Benefits were Mr. Gmitter and Ms. Andrews, representing the Company, and Mr. Bittkau and Mr. Derry, representing the Union. During this meeting, the parties agreed to three (3) changes in terminology in the second paragraph of Defendant's Exhibit 25.

Mr. Gmitter requested that the term "provider" in the tenth line of the second paragraph be stricken because he thought that the inclusion of that word could be interpreted as requiring the Company to continue with the same participating network of physicians and hospitals. [1989 Trial Transcript at 86-87]. Mr. Gmitter stated to Mr. Bittkau that, if the Company were required to maintain the participating network of physicians and hospitals, the Company would never be able to change insurance carriers without the approval of the UAW. [1989 Trial Transcript at 87; *see* Findings of Fact, No. 21 (Mr. Collins, Chief Union Spokesperson, had previously told Mr. Gmitter, Chief Company Spokesperson, that the Company would not be required to have a change in carriers ratified by the UAW membership.)]. Mr. Bittkau agreed with Mr. Gmitter that the inclusion of the word "provider" in the tenth line of the second paragraph was confusing and, therefore, should be stricken.

Then Mr. Bittkau suggested that the term "provider" be replaced with the word "carrier." Ms. Andrews scratched out the word "provider" and wrote in above

it the word "carrier." In response to that suggestion, Mr. Gmitter stated that the same problem existed with the word "carrier" as existed with the word "provider." Mr. Gmitter said "it's almost like saying that the current Blue Cross/Blue Shield arrangement with Blue Cross/Blue Shield will continue." [1989 Trial Transcript at 88].

Mr. Gmitter then suggested to Mr. Bittkau that they strike "carrier" and simply say "the current arrangement with Blue Cross/Blue Shield." [1989 Trial Transcript at 88]. Mr. Bittkau agreed to this suggestion. Mr. Gmitter understood the phrase "current arrangement with Blue Cross/Blue Shield" to mean the current fee-for-service system that Mack had with Blue Cross/Blue Shield at that time. [1989 Trial Transcript at 89].

For the same reasons that he suggested scratching the term "provider" in the tenth line of the second paragraph, Mr. Gmitter also suggested scratching the term "provider" in the thirteenth and fifteenth lines of the same paragraph. In the thirteenth and fifteenth lines, the word "provider" was replaced with the words "delivery system." The parties replaced the term "provider" with the term "delivery system" in order to permit the Company the option of changing insurance carriers without the Union's consent, as long as the terms and conditions of coverage remained unchanged. The inclusion of the term "delivery system" also prevented the Company from offering its employees alternative delivery systems, such as HMOs or PPOs, without the mutual agreement of the Union. [1989 Trial Transcript at 90].

26. On November 7, 1989, representatives of the Company and the Union met again to approve and adopt the final version of the contract language that would replace the second paragraph of Article I, section 2 of Appendix B of the 1980 Master Agreement. For the Union, Mr. Bittkau and Mr. Derry initialed and dated both pages of

the final version of the contract language.[3] For the Company, Mr. Gmitter initialed and dated both pages. [Defendant's Exhibit 6, p. 8].

27. The final version of the second paragraph of Article I, Section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement, as approved in final form by the parties on November 7, 1984, reads as follows:

> The Company shall arange for group insurance coverage as here and after provided.
>
> Such coverage shall be arranged at the Company's sole discretion, in any manner or through any organization, including, but not limited to, a program or programs provided by an insurance carrier; by arrangement with a hospital plan corporation, professional health service corporation, or similar plan or organization; through a health maintenance organization or similar plan or organization; through a preferred provider arrangement; through a self-insured plan, or through a combination of any or

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[3] Plaintiff contends the Union supplied this court with a copy of this document that did not contain Mr. Bittkau's initials in an effort to disclaim responsibility for the changes to which Mr. Bittkau agreed at the meeting on November 1, 1984. *See* Defendant's Post-Trial Brief at 9-10. *Compare* Plaintiff's Exhibit No. 4 *with* Defendant's Exhibit No. 26.

Although the Union did not offer any explanation as to why Mr. Bittkau's initials are not present on Plaintiff's Exhibit No. 4, the Union does not deny that Mr. Bittkau was present at the meeting on November 1, 1984 when the parties agreed to a change in terminology from "provider" to "delivery system." *See* Plaintiff's Post-Trial Brief at 22-24. Nor does the Union contend that Mr. Bittkau was not present at the meeting on November 7, 1984 when the parties formally approved and adopted the language. *Id.*

Therefore, because the relevant material facts pertaining to the meeting on November 1, 1984 are not indispute, I do not have to decide whether the Union supplied me with evidence which has been intentionally altered or the inference to be drawn from such evidence.

such methods. The terms and conditions of coverage, including those amendments made in these negotiations, are continued on the assumption that the current arrangement with Blue Cross/Bue Shield will continue for the term of the labor agreement. The Company shall not exercise its option to select an alternate delivery system until the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any delivery system other than Blue Cross/Blue Shield.

The benefits provided under this Agreement,* including the terms and conditions of coverage, the rules for initial eligibility, continuation of coverage and other general conditions (including definitions and limitations) of coverage as amended from time to time pursuant to the mutual agreement of the parties, shall remain in effect during the term of this Agreement and shall not be altered by the provisions of any agreement between the Company and any benefit program provider. If there is a conflict between the language of this Agreement and that of any agreement between the Company and any benefit program provider, the language of this Agreement shall control.

*The benefits coverage in effect on the date of execution of this Agreement, including the terms and conditions of coverage, the rules of initial eligibility, continuance of coverage, and other general conditions of coverage contained in Appendix B and Publication Form 5551-360-0012 (Revised March 1, 1980 [;] except where there is a conflict between that Publication and those terms and conditions previously negotiated by the parties and set forth in an Appendix B [,] those negotiated terms shall control to the extent necessary to resolve the conflict.)

[Defendant's Exhibits 6, p. 8; Defendant's Exhibit 25].

28. The result of the negotiations described above is a contract (1) that requires the Company to continue the terms and conditions of coverage, as specified in Appendix D, and to deliver those benefits on the traditional or fee-for-service basis, (2) that provides the company with the option of selecting an alternative delivery system for providing health care benefits, such as an HMO or a PPO, but only after the Company and the Union have reached mutual agreement on the terms and conditions that would be applicable to any alternative delivery system, and (3) that provides the Company with the sole discretion of selecting the organization through which its health care benefits are delivered.

D. *The Change From Blue Cross/Blue Shield to Equitable*

29. Effective January 1, 1986, Mack replaced Blue Cross/Blue Shield with Equitable as the carrier for the contractually mandate life, disability, and health benefits.[4] [Stipulation No. 26].

30. Equitable delivers health benefits on the same fee-for-service basis as did Blue Cross/Blue Shield.

31. Mack has stipulated that the terms and conditions of coverage under Equitable are identical to the terms

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[4] Because I conclude that Mack did not breach the collective bargaining agreement, I do not include in my Findings of Facts any findings with respect to the events which occurred between November 7, 1984, when the parties approved and adopted the contract language at issue in this case, and January 1, 1986, when Mack switched to Equitable. Those facts are not relevant to my determination of what the parties intended when they entered into the contract.

Consequently, I need not address the Company's contention that Mr. Derry altered his notes from the Benefits Committee meeting held on September 12, 1985 in order to make it appear that he had informed the Company that it could not change carriers without the consent of the Union. *See* Defendant's Post-Trial Brief at 10-13.

and conditions of coverage under Blue Cross/Blue Shield. [1986 Trial Transcript at 2.30-2.31].

32. The administration of the health benefits plan has been more efficient under Equitable than it was under Blue Cross/Blue Shield. [1989 Trial Transcript at 35].

33. A rollback from Equitable to Blue Cross/Blue Shield would take approximately 90-180 days. In addition, it would cost the Company, conservatively speaking, approximately $750,000 more per year to go back to Blue Cross/Blue Shield. [1989 Trial Transcript at 31 & 36].

34. Equitable has administered Mack's health benefits plan at a savings of approximately $750,000 per year, without any reduction in the benefits offered to individuals covered under the plan. [1989 Trial Transcript at 35-36].

III. DISCUSSION

To determine whether the Union is entitled to the permanent injunction that it seeks, I must first decide whether the Union has succeeded on the merits of its claim that the Company breached the 1984 Master Bargaining Agreement by switching insurance carriers without the Union's approval. *Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F. Supp. 1055, 1057 (E.D. Pa. 1981). Therefore, the crux of this case is the interpretation of the second paragraph of Araicle I, section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement. *See* Defendant's Exhibit 26.

Initially, I must determine as a matter of law which category the contract provision at issue falls into—clear or ambiguous. *Kroblin Refrigerated Xpress, Inc. v. Pitterich*, 805 F.2d 96, 101 (3d Cir. 1986). "[A]mbiguous writings are interpreted by the fact finder and unambiguous writings are interpreted by the court as a

question of law." *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1011 n.10 (3d Cir. 1980). Although this is a non-jury case, and I will ultimately make both determinations, it is nonetheless important to distinguish between findings of fact and conclusions of law, especially for purposes of appellate review.

In making the ambiguity determination, I must consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence offered in support of those meanings. *See Krob-lin*, 805 F.2d at 101; *Mellon Bank*, 619 F.2d at 1011. Based on this evidence, I must decide whether "there is objective indicia that, from the linguistic reference points[s] of the parties, the terms of the contract are susceptible of differing meanings." *Mellon Bank*, 619 F.2d at 1011. A contract will be found to be ambiguous if it is reasonably susceptible to different constructions, is obscure in meaning through indefiniteness of expression, or has a double meaning. *Metzger v. Clifford Realty* Corp., 327 Pa. Super. 377, 476 A.2d 1, 5 (1984).

The contractual provision which is at issue is the second paragraph of Article I, section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement. *See* Findings of Fact, No. 26. In particular, the Union contends that the Company breached the agreement by not complying with the following sentence:

> The Company shall not exercise its option to select an alternate delivery system until the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definition that would be applicable to any delivery system other than Blue Cross/Blue Shield.

The Union contends that this sentence "clearly says [Mack] cannot change carriers unless it reaches mutual agreement with the Union on the terms and conditions of coverage." [1986 Trial Transcript at 2.20]. On the other

hand, Mack contends that this sentence only prohibits it from switching to an "alternate delivery system." Mack further contends that switching from one insurance carrier to another, both providing health benefits on a fee-for-service system, is not switching to an "alternate delivery system" and that, therefore, it did not breach the collective bargaining agreement.

The key to resolving this dispute is resolving the interpretation of the term "delivery system." In order for the Union's interpretation to be correct, the term "delivery system" would have to be synonymous with "carrier." In support of that theory, the Union makes a textual argument by looking to the contract language itself. The Union argues that Blue Cross/Blue Shield, a carrier, is a delivery system because it is referred to as such in the following phrase: "any delivery system other than Blue Cross/Blue Shield." The UAW did not offer into evidence any testimony from either of its two Union representatives, who were present at the November 1, 1984 meeting, as to why they approved the substitution of the term "provider" with "delivery system" and how they interpreted the term "delivery system." If the parties had left the term "provider" in the sentence, I would have no problem in agreeing with the Union's interpretation. However, the fact is that the parties scratched the term "provider" and replaced it with the term "delivery system." Therefore, I must conclude that the parties intended the term "delivery system" to mean something other than a "provider" of health care benefits.

Mack, on the other hand, contends that "delivery system" means a system or manner of delivering health insurance benefits as opposed to the organization or company that provides those benefits. In support of this interpretation of the term, Mack offered into evidence the testimony of Mr. Gmitter, the Company's Chief Spokesperson on the Joint Committee on Health Benefits,

who was present at the meeting on November 1, 1984 when the term "delivery system" was inserted in the contract. Rather than actually defining the term "alternate delivery system," Mr. Gmitter gave examples of alternate delivery systems—a health maintenance organization, a preferred provider organization, or a preferred provider arrangement. [1980 Trial Transcript at 70]. Mr. Gmitter distinguished these alternate systems of delivering group health benefits with the traditional fee-for-service system. [1989 Trial Transcript at 90]. Mr. Gmitter testified that he suggested replacing the term "provider" with "delivery system" because he wanted to make sure that the language would permit the Company to exercise the option of changing insurance carriers, as long as that carrier delivered the group health benefits on a fee-for-service system and provided the same terms and conditions of coverage as Blue Cross/Blue Shield. If that were the intent of the parties at the time they approved and adopted the contractual provision, they certainly could have stated the sentence in an alternative and more precise manner. For example, the sentence at issue could have been written as follows: "The Company shall not exercise its option to select an alternate delivery system until the parties have reached mutual agreement on the terms and conditions . . . that would be applicable to any delivery system other than a fee-for-service system, such as the current arrangement with Blue Cross/Blue Shield."

I conclude that the term "delivery system" is ambiguous. This term is reasonably susceptible to different meanings. In addition, the use of alternative or more precise language would have put the meaning of this sentence beyond dispute. *See Metzger v. Clifford Realty Corp.*, 327 Pa. Super. 377, 476 A.2d 1, 6 (1984) ("In determining whether a written contract contains . . . an ambiguity, the court may consider 'whether alternative or more precise language, if used, would have put the matter beyond reasonable question.' ").

Now as fact finder, I must proceed with the task of interpreting the meaning of the term "delivery system." Because I have concluded that this term is ambiguous, I may consider extrinsic evidence to ascertain the intent of the parties when they adopted and approved Article I, section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement. *Linder v. Inhalation Therapy Services, Inc.*, 834 F.2d 306, 310 (3d Cir. 1987). Once I have determined the intent of the parties, I must interpret the contract in order to give effect to that intent.

In 1984, when the parties were negotiating the new collective bargaining agreement, the Union was not happy with the administrative services provided by Blue Cross/Blue Shield. The Union requested the removal of the language in Article I, section 2 of Appendix B requiring the Company to contract exclusively with Blue Cross/Blue Shield. The Union did not seem concerned with which organization provided its members with health benefits. What the Union desired was to establish terms and conditions of health benefits that would be applicable to any organization or provider. The Company, on the other hand, was exploring ways of containing the costs of its health benefits and, thus, did not want to be bound by the contract to one particular organization or one particular system of delivering health benefits.

On November 1, 1984, the parties met to continue negotiating the language contained in Article I, section 2 of Appendix B. Mr. Gmitter, the Company representative, testified that he suggested replacing the term "provider" with the term "delivery system" in order to assure that the Company would have the option of switching to another insurance carrier, as long as the insurance carrier provided benefits on a fee-for-service basis and on the same terms and conditions as Blue Cross/Blue Shield.

Although the Union certainly is aware that the crux of its case is one of contract interpretation,[5] it presented no evidence as to what took place at the meeting on November 1, 1984. The Union did not question either of its representatives present at that meeting as to why the term "delivery system" was inserted into the Contract or how its representatives interpreted that term. Instead, the Union relies on its textual argument that the plain meaning of the words shows that a delivery system is an insurance carrier.

Because I have found that the term "delivery system" is ambiguous, I am not limited to the four corners of the contract in order to interpret its meaning. I find Mr. Gmitter to be a very credible witness. Since his testimony concerning what happened at the November 1, 1984 meeting is not contradicted, I find that the parties agreed to replace the term "provider" with the term "delivery system" with the intent of providing the Company the option of switching insurance carriers without the Union's consent. At the same time, the parties intended to prohibit the Company from implementing any alternative delivery systems, such as HMOs or PPOs, without the consent of the Union.

Therefore, I interpret the term "delivery system" as used by the parties in Article I, section 2 in Appendix B to mean a *system* or *manner* of delivering health benefits, as opposed to the *organization*, such as a carrier, that actually delivers the benefits. I interpret the term "alternate delivery system" to mean a delivery system other than the traditional fee-for-service system.

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[5] In its post-trial brief, the Union states that the "central issue before this court is whether Mack's unilateral decision to change health insurance carriers from Blue Cross/Blue Shield to Equitable, without first obtaining the agreement of the Union to the terms and conditions of such health insurance coverage, violated the collective bargaining agreement between the parties." *See* Plaintiff's Post-Trial Brief at 2. *See also* 1989 Trial Transcript at 69.

The testimony of Mr. Beech, the Company's expert in the field of employee benefits and health care, further supports this interpretation. Mr. Beech testified that the terms "carrier" and "delivery system" are not used interchangeably in the health benefits field. [1989 Trial Transcript at 14-15]. However, Mr. Beech also testified that a carrier could offer a variety of delivery systems. In addition to offering the traditional fee-for-service system, it is customary practice for a carrier to sponsor and establish an alternative delivery system, like an HMO or PPO, either at a specific client's request or on a speculative basis in order to attract customers and sell health insurance products. [1989 Trial Transcript at 15]. The Union did not present any expert witness to contradict Mr. Beech's testimony. Therefore, because Mr. Beech's testimony is not contradicted and I find him to be a credible witness, I conclude that his testimony concerning the field of employee benefits and health care, in particular the definitions of various terms, is correct and accurate. *See* Findings of Fact, Nos. 8-12.

The 1980 version of Appendix B required the Company to contract with Blue Cross/Blue Shield but provided that the parties could by mutual agreement switch to another carrier. The UAW contends that the 1984 version of Appendix B does not require Mack to contract with Blue Cross/Blue Shield but does require Mack to obtain the Union's mutual agreement in order to switch from Blue Cross/Blue Shield. This is a distinction without a difference. The Union's interpretation of the contract language would mean that "after six weeks of meetings, after preparation of at least three drafts that preceded what is now Plaintiff's Exhibit 4 and Defendant's Exhibit 26, and after lengthy discussion and revision of those drafts before and after a ten-day strike, the parties adopted a contract provision in 1984 that is three times as long yet says exactly the same thing as its predecessor." [Defendant's Post-Trial Brief at 13-14].

It is unlikely that the parties intended to say the same thing in the 1984 version of Article I, section 2 as they had said in the 1980 version. If they had, they could have simply left the language unaltered and saved themselves a great deal of time and aggravation. The law prefers a permissible interpretation that gives reasonable, lawful, and effective meaning to a contract provision over an interpretation that leaves a provision unreasonable, unlawful, or of no effect. *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3d Cir. 1981). Therefore, I will not interpret the changes made to the 1984 version of Article I, section 2 of Appendix B to have no effect and to, in essence, mean the same thing as the 1980 version.

I interpret Article I, section 2 of Appendix B of the 1984 Master Agreement as a contract that

1. requires the Company to continue the terms and conditions of coverage, as specified in Appendix B, and to deliver those benefits on the traditional or fee-for-service basis;

2. provides the Company with the option of selecting an alternative delivery system for providing health care benefits, such as an HMO or a PPO, but only after the Company and the Union have reached mutual agreement on the terms and conditions that would be applicable to any alternative delivery system; and

3. provides the Company with the sole discretion of selecting the organization through which its health care benefits are delivered.

This interpretation of Article I, section 2 of Appendix B is logical in light of its bargaining history and the manifest intent of the parties to (1) replace Blue Cross/Blue Shield, [Stipulation No. 7; 1989 Trial Transcript at 70-72], and (2) reserve, for the future, discussions concerning alternative cost efficient systems for delivering

health care benefits. [Defendant's Exhibit No. 6, pp. 19-20].

Accordingly, I conclude that Mack did *not* breach Article I, section 2 of the 1984 Master Agreement by unilaterally switching from Blue Cross/Blue Shield to Equitable without the mutual agreement of the Union. Because the Union has not met its burden of succeeding on the merits of its claim that the Company breached the collective bargaining agreement, the Union is not entitled to a permanent injunction.

Further, I conclude that the Union is not entitled to a permanent injunction because the balance of the equities tips in favor of the Company. *See Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F. Supp. 1055, 1057-58 (E.D. Pa. 1981). A court-ordered rollback to Blue Cross/Blue Shield would burden Mack and the beneficiaries under Mack's health benefits plan substantially more than it would benefit the UAW. The Union's interest in its bargaining chip is not absolute as a matter of equity and must be considered in light of the hardship that would inure to the Company and the beneficiaries of the Company's health benefits plan if I were to order a return to Blue Cross/Blue Shield. *Id.* at 1057.

The Company would suffer a hardship in that it would have to pay at least $750,000.00 more per year to Blue Cross/Blue Shield for the same services currently being provided by Equitable and with full knowledge that the services provided by Blue Cross/Blue Shield had in the past been highly unsatisfactory. In addition, Mack would be burdened with the monumental task of converting an entire health benefits administration system mid-year and mid-contract. The conversion to Blue Cross/Blue Shield is estimated to take anywhere from three to six months.

The thousands of beneficiaries under Mack's health benefits plan would also suffer a hardship. These beneficiaries have the most vital interests at stake. A return to Blue Cross/Blue Shield would, in effect, mean that their claims

for reimbursement for health care costs would be handled much less efficiently. Their ability to obtain proper and prompt reimbursement for the costs of health care for themselves and their families would be substantially impaired. Under Equitable, these beneficiaries are receiving the same benefits which they received under Blue Cross/Blue Shield but without the frustration involved with inefficient claims administration. The Equitable program has been in effect now for more than four years. During that time, the constant barrage of complaints from Union members about administrative inefficiency has ceased and the Equitable program has proven itself to be an efficiently run program. The coverage, including exclusions and definitions, under the Equitable program is identical to that under the Blue Cross/Blue Shield program.

In balancing these competing interests, I conclude that the balance of the equities militates strongly against granting the permanent injunction sought by the Union. The Union's institutional interest in preserving its bargaining chip, although important, does *not* outweigh the substantial harm that would inure to the Company and the beneficiaries of the Company's health care plan if I were to require a rollback to Blue Cross/Blue Shield.

IV. CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185.

2. Article I, section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement is ambiguous.

3. Article I, section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement did not prohibit Mack from removing Blue Cross/Blue Shield as the insurance carrier and contracting with Equitable for the administration of its health benefits plan.

4. Article I, section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement required "mu-

tual agreement" for a change to an "alternate delivery system." Article I, section 2 of Appendix B, however, did not require mutual agreement for a change in carriers, as long as that carrier delivered benefits on a fee-for-service basis and provided benefits on the same terms and conditions as had Blue Cross/Blue Shield.

5. Because Equitable delivers benefits on a fee-for-service basis and provides benefits on the same terms and conditions as had Blue Cross/Blue Shield, Mack did *not* breach Article I, section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement by switching insurance carriers without the UAW's consent.

6. Because Mack did not breach Article I, section 2 of Appendix B of the 1984 Master Collective Bargaining Agreement, the UAW is not entitled to the injunctive relief that it seeks.

7. I conclude that the balance of the equities tips in favor of the Company, and in consideration of the equities, the Union is not entitled to the permanent injunction which it seeks.

An appropriate order follows.

/s/ Daniel H. Huyett, 3rd
DANIEL H. HUYETT, 3RD
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 85-7417

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

v.

MACK TRUCKS, INC.

ORDER

HUYETT, J. February 8, 1990

For the reasons stated in the foregoing Findings of Fact, Discussion, and Conclusions of Law, judgment shall be entered in favor of defendant and against plaintiff on all counts of complaint.

IT IS SO ORDERED.

/s/ Daniel H. Huyett, 3rd
DANIEL H. HUYETT, 3RD
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 85-7417

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

v.

MACK TRUCKS, INC.

FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS OF LAW

HUYETT, J. August 28, 1986

Plaintiff International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) brought this equitable action under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. The Union sought to prevent defendant Mack Trucks, Inc. from changing the health insurance carrier that provides coverage for its employees. After UAW rested in its presentation to the court, Mack moved for a directed verdict, pursuant to Federal Rule of Civil Procedure 50(a). After reviewing the evidence submitted by the Union and hearing arguments from counsel for both parties, I granted the motion on August 20, 1986 in a ruling from the bench. What follows is a more detailed explanation of my decision.

I. INTRODUCTION

The UAW filed this complaint along with a motion for a preliminary injunction on December 26, 1985. It sought to enjoin Mack from implementing a proposed change

from health insurance coverage with Blue Cross/Blue Shield to Equitable Life Assurance Society. The UAW insisted that, under the terms of the collective bargaining agreement between the parties, Mack could not change its health insurance carrier without its consent. After negotiation, the Union withdrew its motion for a preliminary injunction, and the parties agreed to exchange information and to meet to discuss the planned shift to Equitable. The UAW asked to submit the dispute to binding arbitration, but Mack took the position that its action was not subject to arbitration, as specified in the collective bargaining agreement. After months of further negotiations, it became clear that the parties could not resolve their differences, so trial began to decide the question of a permanent injunction.

II. Findings of Fact

1. Mack and the UAW are parties to a master labor agreement, covering the period from October 30, 1984 to October 20, 1987.

2. Previous labor agreements between Mack and the Union specifically provided that Blue Cross/Blue Shield would be the health insurance carrier.

3. Before and during the negotiations leading to the 1984 agreement, Union members expressed dissatisfaction with the quality of service provided by Blue Cross/Blue Shield.

4. The 1984 agreement contains the following language in Appendix B (Insurance Program):

> The Company shall arrange for group insurance coverage as here and after provided.
>
> Such coverage shall be arranged at the Company's sole discretion, in any manner or through any organization, including, but not limited to, a program or programs provided by an insurance carrier; by

> arrangement with a hospital plan corporation, professional health service corporation, or similar plan or organization; through a health maintenance organization or similar plan or organization; through a preferred provider arrangement; through a self-insured plan; or through a combination of any or such methods. The terms and conditions of coverage, including those amendments made in these negotiations, are continued on the assumption that the current arrangement wiht Blue Cross/Blue Shield will continue for the term of the labor agreement. The Company shall not exercise its option to select an alternate *delivery system* until the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any *delivery system* other than Blue Cross/Blue Shield.

This provision was inserted in the document at the Union's request.

5. As testified by Union representative Jack Derry, the UAW repeatedly informed Mack, over the course of 1985, that it interpreted this clause to mean that Mack could not switch its coverage from Blue Cross/Blue Shield without the Union consent.

6. During November and December 1985, Mack and Union officials discussed the former's plan to change carriers to Equitable, as of January 1, 1986. On November 18th, Mack, UAW, and Equitable representatives met at Equitable headquarters in Columbus, Ohio, to consider the details of the proposed coverage agreement.

7. Article 24 of the 1984 collective bargaining agreement provides: "No matter respecting the provisions of the Insurance Program shall be subject to the grievance procedure established in this Agreement, except as expressly provided therein."

8. Appendix B itself says: "It is understood that no grievance procedure of any collective bargaining agreement between the parites hereto shall apply to the Insurance Program." It did provide for arbitration of disputes concerning individual claims for benefits.

9. To date, the UAW can point to only two minor complaints from its members relating to coverage with Equitable.

10. Mack's insurance program covers approximately 6900 active employees and their familities plus approximately 3300 retirees (or surviving spouses of retirees).

11. The Union has pointed to no instance in which one of its members has suffered under the Equitable coverage by receiving less of a benefit than he would have under coverage with Blue Cross/Blue Shield.

12. Mack has stipulated that the terms and conditions of the coverage program under Blue Cross/Blue Shield and under Equitable are identical. Furthermore, Mack has stipulated that it will remedy the situation if any differences do exist and are brought to its attention.

III. DISCUSSION

The UAW asks for two alternate forms of relief. First, it requsts that this dispute be sent to arbitration. Second, it seeks a permanent injunction, requiring Mack to resume its health insurance contract with Blue Cross/Blue Shield. I find both suggestions inappropriate.

A. *Arbitration*

As the Union properly points out, whenever an ambiguity exists about arbitration, courts should resolve the doubt in favor of arbitration. *Controlled Sanitation Corp. v. District 128, International Association of Machinists*, 524 F.2d 1324, 1328 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) ("there is a presumption in favor of aritrability which should be dispelled only when the agreement

explicitly exempts certain conduct from arbitration or when the terms of the agreement, read as a whole, clearly envision non-arbitrability"). But in this case, the language of the agreement explicitly and unambiguously states that "no grievance procedure of any collective bargaining agreement between the parties hereto shall apply to the Insurance Program." Where the language is so clear, there is no question that the dispute should not be sent to arbitration.

B. *Injunction*

In deciding whether to grant a permanent injunction, a judge must weigh a number of factors. These have been set out by Judge Lord in *Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F. Supp. 1055, 1057-58 (E.D.Pa. 1981) (citations omitted):

> A district court deciding whether a permanent injunction should be issued must undertake a three stage inquiry. First, the court must decide whether plaintiffs have actually succeeded on the merits of their claim. Second the court must decide whether the "balance of equities" favors the granting of injunctive relief. Finally, the court needs to decide what form the injunctive remedy should take. Particularly when "balancing the equities," the judge should exercise his discretion in determining the propriety of injunctive relief. Among the factors traditionally considered in this balance are: the adequacy of another remedy; the benefit to the plaintiff if injunctive relief is granted and hardship if such relief is denied; the hardship on the defendant if injunctive relief is granted; the hardship on third parties; the convenience and effectiveness of administration; and the public and social consequences of either granting or denying injunctive relief.

In determining whether to issue the injunction sought by the Union, I thus must consider whether Mack violated

the collective bargaining agreement and, if so, whether equitable relief is the proper remedy. I agree with the UAW that Mack failed to comply with the provisions of the insurance program agreement, but I do not find that the balance of the equities tips in favor of an injunction.

1. *Merits*

In Appendix B to the collective bargaining agreement, Mack promised not to "exercise its option to select an alternate delivery system until the parties have reached mutual agreement on the terms and conditions including restrictions, limitations and definitions that would be applicable to any delivery system other than Blue Cross/Blue Shield." Mack contends that by signing the insurance program document, the UAW tacitly accepted the terms and conditions of the Blue Cross/Blue Shield coverage. Mack further reasons that the Union's approval of the document constituted the "mutual agreement" needed before the Company could exercise its option to select an alternate delivery system. I disagree with this interpretation for two reasons.

First, Mack's view simply flies in the face of the simple language of the agreement. The quoted provision was inserted in the document at the Union's request. It would serve no purpose were Mack free to change carrier as soon as the UAW signed the agreement. The only possible reason for its inclusion is to prevent Mack from switching carriers without the Union's consent.

Second, Mack knew that the UAW did not share its interpretation of the document. As early as June 1985, Derry told Mack officials that the Union intended to hold Mack to the strict terms of the agreement. UAW representatives repeatedly expressed this view to Mack over the course of their negotiations in the past year. It was, therefore, clear to Mack from the outset of this dispute that there had never been mutual agreement on the terms and conditions of the insurance coverage.

2. *Equities*

Mack claims that if I grant the injunction, it will suffer a severe hardship while its employees will receive little or no benefit. I find that the Union has not carried its burden of showing that a significant benefit will result from enjoining Mack's continuing coverage with Equitable.

First, the UAW could point to no evidence of widespread or even minor dissatisfaction with Equitable among its members. It was stipulated that there were numerous complaints about the quality of care provided under the Blue Cross/Blue Shield plan. But among the thousands of Mack affiliates now served by Equitable, only two have submitted complaints about the health insurance system.

Second, Mack has submitted a stipulation to the court, assuring that the benefits provided under the Equitable plan will be identical to those available with Blue Cross/Blue Shield.

Finally, as Mack noted in its brief, there will be some administrative difficulties if it is immediately forced to effect a change in carrier. Although no evidence was offered about these potential problems, it is obvious that a forced switch back to Blue Cross/Blue Shield will pose somewhat of a hardship to the Company. Even more importantly, changing carriers at this point might prove to be a hardship to UAW members—the very people whose welfare is at issue here. Reimbursement of expenses could well be delayed, or benefit coverage otherwise confused.

The Union insists that an injunction should be issued to preserve the integrity of its collective bargaining process with Mack and with other employers. Although I agree with the UAW that Mack violated the insurance program agreement, I decline to issue an injunction merely to correct a technical breach. Were the Union able to demonstrate that its members have been damaged by the switch to Equitable, then an injunction may be warranted.

But without any such proof, the UAW has failed to meet its burden, and it would be improper for me to grant equitable relief.

IV. CONCLUSIONS OF LAW

1. I have jurisdiction over this action under section 301 of the LMRA.

2. This case is not arbitrable because the master labor agreement between Mack and the Union expressly excludes from arbitration all matters relating to the provisions of the insurance program, except disputes over individual claims for benefits.

3. Mack breached the collective bargaining agreement by changing its health insurance carrier from Blue Cross/ Blue Shield to Equitable without the consent of the UAW.

4. The Union has failed to demonstrate that its members have been harmed by Mack's technical violation of the contract.

5. Because there is no evidence of damage to Union members, the UAW is not entitled to a permanent injunction.

/s/ Daniel H. Huyett, 3rd
Judge
DANIEL H. HUYETT, 3RD
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 85-7417

INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL EQUIPMENT WORKERS OF AMERICA, UAW

vs.

MACK TRUCKS, INC.

CIVIL JUDGMENT

Before HUYETT, J.

AND NOW, this 25th day of August, 1986, in accordance with the order dated August 20, 1986, granting the defendant's motion for a directed verdict under Rule 50

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant and against the plaintiffs.

By the Court:

Attest:

/s/ Francis E. DeVine
FRANCIS E. DEVINE
Deputy Clerk

Entered: 8/25/86

Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 85-7417

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

v.

MACK TRUCKS, INC.

[Filed Dec. 23, 1987]

ORDER

AND NOW, this 22nd day of December, 1987, upon consideration of plaintiff's Motion for Reconsideration and defendant's Response thereto, it is hereby ORDERED and DECREED that the Motion is DENIED.

/s/ Daniel H. Huyett
J.

ENTERED: 12/23/87
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 85-7417

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

v.

MACK TRUCKS, INC.

CIVIL JUDGMENT

[Filed Feb. 12, 1990]

Before HONORABLE DANIEL H. HUYETT, 3rd

AND NOW, this 9th day of February 1990, in accordance with Findings of Fact, Discussion, Conclusions of Law, and Order dated February 8, 1990,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendant and against plaintiff on all counts of the complaint.

BY THE COURT:

ATTEST: /s/ Leslie F. Stott
LESLIE F. STOTT
Deputy Clerk

(2)

No. 90-1149

Supreme Court, U.S.
FILED
FEB 15 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Petitioner,

v.

MACK TRUCKS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant who moves successfully to dismiss the complaint at the close of the plaintiff's case has waived his right to present a defense in the event an appellate court later reverses the dismissal and remands the case for completion of the trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1149

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Petitioner,

v.

MACK TRUCKS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit are identified in and appended to the Petition for a Writ of Certiorari and will not be reprinted here.

COUNTERSTATEMENT OF THE CASE

This is an action brought in December 1985 by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") pursuant to Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, to enjoin

preliminarily and permanently the decision of Respondent Mack Trucks, Inc.[1] ("Mack" or "the Company") to change health care benefit carriers from the Blue Cross/Blue Shield organization to the Equitable Life Assurance Society of the United States. The UAW contended that the collective bargaining agreement in effect between the UAW and Mack prohibited a change of carrier without the consent of the UAW.[2]

After discussion between the parties, the UAW withdrew its request for preliminary injunction, and the carrier change became effective on January 1, 1986. The UAW continued to press for a permanent injunction rolling back the change, and the case went to trial in the district court in August 1986.

The UAW contended at trial that the collective bargaining agreement prohibited Mack from changing health care benefit carriers without the approval of the UAW. At the close of the plaintiff's case, Mack moved for a directed verdict pursuant to Rule 50, Fed. R. Civ. P.,[3] arguing (a) that the Union had failed to prove any damage to its members, and thus had not made out a

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[1] Mack Trucks, Inc. is a wholly-owned subsidiary of Renault Vehicules Industriels, S.A. Mack has no subsidiaries that are not wholly-owned.

[2] Mack and the UAW were parties to a Master Collective Bargaining Agreement covering the period from October 30, 1984 to October 20, 1987. A successor agreement, containing the same language that is in dispute here, remains in effect at present.

[3] *See* the second opinion of the court of appeals, *UAW v. Mack*, Petitioner's Appendix p. 5a, n.2, which states:

> Although the district court and the parties referred to Mack's motion as a Rule 50 motion, the trial was non-jury, and the proper motion would have been under Rule 41(b). Rule 50 applies to jury trials; Rule 41(b) applies to non-jury trials. *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474 (3d Cir. 1979). But this is of no consequence. When either motion is denied or reversed on appeal, the process is the same—the trial continues.

right to relief even if Mack had violated the agreement; and (b) that on the evidence presented in the plaintiff's case, the UAW had not proved a breach of contract.

The district court heard argument on the motion for directed verdict, and granted the motion, entering judgment in Mack's favor without hearing any of Mack's evidence. The court held that the UAW had proved a breach of contract, but that its failure to establish actual harm to UAW members was fatal to its case.

The UAW appealed the decision of the district court, and on June 5, 1987, the United States Court of Appeals for the Third Circuit reversed the district court, holding that:

> The Union came forward with proof that Mack's decision to change unilaterally the health insurance carrier violated the collective bargaining agreement and caused the Union substantial harm by depriving it of a bargaining chip which the Union might trade for other Mack benefits.

820 F.2d at 98.

Although the court held that the UAW had established that the company's action had caused "substantial harm" that required a remedy, the court remanded the case to the district court because Mack had not yet had the opportunity to present a defense. The Court stated:

> However, we will not (as the UAW requests) order the district court presently to grant [a permanent injunction], since the directed verdict precluded Mack from introducing evidence to counter the Union's case. Accordingly, we will remand this case for further proceedings.

Id.

On remand, Mack maintained its defense that it had not violated the contract, and fortified that defense with new exhibits and a new argument. The UAW attempted to bar Mack from contending it had not violated the con-

tract. In an Order dated July 14, 1989, the court allowed Mack to prove that it had not violated the contract. The trial resumed on October 4, 1989, with the presentation of Mack's defense. Mack presented evidence that the language of the collective bargaining agreement permitted the Company to change health benefits insurance carriers, provided that the Company did not change from a traditional fee-for-service health benefits program to an "alternate delivery system" such as a health maintenance organization or a preferred provider organization.

The district court accepted Mack's argument that the collective bargaining agreement had not been violated by the carrier change, and entered judgment in favor of the Company on February 12, 1990. The UAW appealed, and the United States Court of Appeals for the Third Circuit affirmed in a decision filed October 18, 1990.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT RAISE AN ISSUE AS TO THE PROPER INTERPRETATION OF THE COMMON LAW DOCTRINE OF LAW OF THE CASE.

The doctrine of law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). The doctrine has been held to apply not only to issues expressly litigated by the parties and decided by a court, but also to issues decided by "necessary implication," *Fogel v. Chestnutt*, 668 F.2d 100, 108 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982), and to issues decided by a trial court that could have been, but were not, raised on appeal. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-93 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985).

A central premise of the doctrine of law of the case—like its sibling doctrines *res judicata* and collateral estoppel—is that the party against whom the doctrine is invoked must have had a full and fair opportunity to litigate the issue on which his opponent now claims finality. Actual litigation of the issue need not have occurred, provided both parties are afforded an opportunity to have the question decided. *Montana v. United States*, 440 U.S. 147, 153-154 (1979). In no case cited by the petitioner has either a district court or an appellate court invoked the doctrine of law of the case against a party who did not enjoy the opportunity to present evidence.

The UAW asked the lower courts to invoke law of the case to bar Mack from contending at the resumption of the trial that it had not violated the Mack-UAW collective bargaining agreement. The UAW argues that the first court of appeals decision in this case settled that issue forever, and that Mack's failure to contest the breach of contract issue on the first appeal bars it from litigating that question now.

As the Court of Appeals for the Third Circuit pointed out, this contention by the UAW disregards the procedural posture of the first appeal. As noted above, Mack won the case in 1986 without presenting any evidence. At the close of the plaintiff's case, the district court held —erroneously, according to the court of appeals—that proof of a violation of the contract was not sufficient to justify relief in the absence of any resultant harm to the UAW members. Because Mack was successful at this point, it could not possibly have appealed from the directed verdict granted by the district court. *Electrical Fittings Corp. v. Thomas & Betts Company*, 307 U.S. 241, 242 (1939); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333 (1980). Accordingly, Mack had no opportunity either to litigate the contract violation issue in the district court, or to raise the issue squarely on appeal. Because Mack's success in moving for judg-

ment at the end of the plaintiff's case in 1986 precluded Mack from putting on its defense, law of the case does not apply, and the subsequent reversal by the court of appeals does not have preclusive effect on whether a violation of the contract had occurred.

The UAW states correctly that when the trial commenced in October 1989, Mack advanced before the district court an argument that had not been an explicit part of its case at the beginning of the trial in 1986. The Union's appeal and its petition before this Court amount to an argument that the district court should not have allowed the Company to add a new legal argument prior to the 1989 trial. Indeed, the UAW raised this argument before the district court prior to trial, and raised it again before the court of appeals. Control of the presentation of witnesses and exhibits before the district court is a matter entrusted to the sound discretion of the district court. Fed. R. Civ. P. 16. It is neither unusual nor alarming for a district court to allow the parties to add witnesses and exhibits, or to modify arguments set forth in their pretrial memoranda at any time up to and including the trial itself.[4] *Ely v. Reading Co.*, 424 F.2d 758, 763-764 (3d. Cir. 1970). The court of appeals in this case found no error in the trial court's handling of the matter. In any event, whether the district court properly permitted Mack to add a new argument is certainly not a matter that this Court need decide on a writ of certiorari.

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[4] Mack announced its intention of adding to the exhibit list more than three months before trial. The district court issued an Order approving the change on July 14, 1989. *See supra* p. 3.

II. THE DECISION BY THE COURT OF APPEALS ON THE ISSUE OF LAW OF THE CASE DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURTS OF APPEALS.

The court of appeals held that the law of the case doctrine did not apply to this case because of the procedural posture in which it was first received by the court of appeals. Specifically, the court of appeals held that because Mack's success on its motion at the close of the plaintiff's case had precluded it from putting on any evidence, the decision of the district court in the original trial—and thus necessarily its own decision on the first appeal—were not the law of the case. This decision does not conflict with case law in any other circuit. In every case cited in the petition as conflicting with the decision of the Third Circuit, the doctrine of law of the case was invoked only after all parties had been afforded a full and fair opportunity to litigate the issue before the district court. All these decisions are consistent with the decision of the Third Circuit in the instant case.

The petition cites the following cases, each of which stands for the proposition that a party who has been afforded the opportunity before the district court to contest an issue, but who abandons that issue in a first appeal, is precluded from seeking reversal of that issue in a second appeal. *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982) (court refused to consider a new contention that could have been raised but was not raised in a prior appeal); *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982) (court refused to consider an issue defendant had chosen not to argue in a prior appeal, though it had been afforded the opportunity); *cert. denied*, 459 U.S. 828 (1982); *Northwestern Indiana Telephone Co., Inc. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 757 (1990) (court refused to consider issue that through

inadvertence, not lack of opportunity, party had failed to raise in prior appeal); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (court refused to hear argument on an issue not challenged on the first appeal when appellant had been afforded the opportunity, and had, in fact, attacked other portions of the award).

In both *Laffey v. Northeast Airlines*, 740 F.2d 1071 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985) and *Little Earth of the United Tribes v. HUD*, 807 F.2d 1433 (8th Cir. 1986) the district courts had entered orders on fully litigated issues that the defendants did not challenge in their initial appeal. In each case, the court invoked law of the case in a second appeal to bar the defendant from challenging the order on the second appeal. In the instant matter, the court below properly declined to invoke the law of the case doctrine because the 1986 Order that was appealed from was adverse to the UAW, not Mack. Thus, the *Laffey* and *Little Earth* decisions do not conflict with the decision of the Third Circuit.

Similarly, this Court's decision in *Arizona v. California*, 460 U.S. 605 (1983), does not conflict with the decision of the court below. In that case, the United States and certain Indian tribes sought to reopen a twenty-year old water rights decree to evaluate areas allegedly not covered by the prior decree. The Court invoked the law of the case doctrine, upholding the prior decree, and reasoning that the factual and legal issues had been fully and fairly litigated in the prior proceeding in the same case.

In no case has this Court or any court of appeals accorded finality to a finding of fact or conclusion of law entered by a court at the close of the plaintiff's case. Therefore, this matter does not present a conflict in the law of the circuit courts of appeals.

CONCLUSION

Because the court of appeals decided correctly that the procedural posture of the case precluded application of the doctrine of law of the case, and because this decision was in accord with the decisions of other courts of appeals on this procedural point, Mack requests that this Court not grant a writ of certiorari.

Respectfully submitted,

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Date: February 15, 1990